IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

CHARLOTTE BROADCASTING, LLC, NEW MABLETON BROADCASTING CORPORATION and RADIO ONE OF NORTH CAROLINA, LLC,	)	
Plaintiffs,	)	
v.	)	C.A. No. 7793-VCG
DAVIS BROADCASTING OF ATLANTA LLC,	)	
Defendant.	)	

MEMORANDUM OPINION

Submitted: January 3, 2013
Decided: April 2, 2013

Thomas E. Hanson, Esquire, and Corinne E. Amato, Esquire of MORRIS JAMES LLP, Wilmington, Delaware, Attorneys for Plaintiff.

Samuel T. Hirzel, II, Esquire of PROCTOR HEYMAN LLP of Wilmington, Delaware, Attorneys for Defendant.

GLASSCOCK, Vice Chancellor.

Where an agreement between two parties has terminated, and one party threatens to sue the second for breach of contract, can the second party create equitable jurisdiction by seeking a declaratory judgment of its rights under the contract and to enjoin the first party from pursuing its rights through (as-yet-unfiled) litigation of its own? Under the facts here, I find the answer to be no. This action involves a request for a declaratory judgment and injunctive relief, arising from purported breaches of an Asset Exchange Agreement. The Defendant has moved to dismiss under Court of Chancery Rule 12(b)(1). Because I find no basis for equitable jurisdiction, that motion must be granted.

I. BACKGROUND FACTS

The following facts are derived from the Amended Complaint.[1] The Defendant, Davis Broadcasting of Atlanta, LLC ("Davis") owns radio station WLKQ in Buford, Georgia. The Plaintiffs are Charlotte Broadcasting, LLC, New Mableton Broadcasting Corporation and Radio One of North Carolina, LLC. The Plaintiffs are Delaware entities and are subsidiaries of Radio One, Inc. (collectively "Radio One"). The business of Radio One is to own and manage broadcast media. Radio One owns and operates a number of radio stations pertinent here: WQNC in Harrisburg, North Carolina; WPZS in Indian Trail, North Carolina; and WPZE in Mableton, Georgia.

[1] Am. Compl., Sept. 25, 2012.

By the beginning of 2011, Radio One wished to increase the signal strength of WPZE to more thoroughly penetrate the Atlanta, Georgia radio market. Such an increase in broadcasting strength is prohibited by FCC regulations because of the proximity of the Radio One's WPZE transmitter to Davis' radio station, WLKQ. The FCC regulation is designed to prevent interference between closely-located radio transmitters. In order to increase WPZE's transmission strength, therefore, Radio One was forced to come to an accommodation with Davis concerning the location of Davis's radio station.[2] Radio One determined that to increase its broadcasting strength in compliance with FCC regulations, Radio One and Davis would both have to change their communities of license and relocate their transmitter sites. In early February of 2011, Radio One and Davis began to negotiate an agreement to accomplish this purpose. Davis was represented in negotiations by Mark Jorgenson, President of Jorgenson Broadcast Brokerage, Inc. ("Jorgenson").[3]

At the end of August 2011, the parties entered into an Asset Exchange Agreement (the "Agreement"). By its terms, the Agreement is governed by the laws of Delaware. The purpose of the Agreement is to enable WPZE to upgrade from a 6,000-watt, Class-A radio station to a 25,000-watt, Class-C station. Under

[2] Under the applicable regulation, the transmitters, which were located 69 kilometers from one another, need to be at least 89 kilometers apart.
[3] According to the Amended Complaint, Jorgenson was authorized to bind Davis.

the Agreement, both Radio One's WPZE and Davis's WLKQ transmitters were to be relocated consistent with FCC regulation. The Agreement contemplated that Davis' transmitter would be moved to a more rural community, rendering that station less valuable. Davis was to be compensated for this move by acquiring two of Radio One's other stations, WQNC and WPZS, and was to be paid $2 million in cash. FCC permission was required before the transmitters could be moved and the Agreement consummated.[4] FCC approval was also required for the transfer of stations WQNC and WPZS from Radio One to Davis. Thus, closing could not occur without FCC approval of the contemplated transaction. The Agreement explicitly provided that both parties were to use "commercially reasonable" efforts to obtain FCC consent.[5]

The only mention of specific performance in the Agreement is on Schedule 1, "Procedure Upon FCC Final Order Dismissing or Denying the RONC Assignment Application."[6] The last paragraph of the Schedule says the following:

> In the event of failure or threatened failure by either Party to comply with the terms of this Agreement, the other Party shall be entitled to an injunction restraining such failure or threatened failure and, subject to obtaining any necessary FCC consent, to enforcement of this Agreement by a decree of specific performance requiring compliance with this Agreement.[7]

---

[4] Under the Agreement, Radio One would move WPZE from Mableton to Dunwoody, Georgia and Davis would move WLKQ's transmitter from Buford to Suches, Georgia.
[5] Am. Compl., Ex. A, Agreement, at Articles 1.3 and 8.4 ("Ag.").
[6] Ag. Schedule 1.
[7] Ag. Schedule 1, ¶ 8.

Thus, any right to specific performance was expressly contingent on the parties' obtaining the necessary FCC consents.

Shortly after entering into the Agreement, Radio One learned that a third party, Clark Atlanta University, had previously filed an application to relocate its transmitter for radio station WCLK in a manner which would prevent the relocation of Radio One's transmitter as contemplated by the Agreement. The first-filed application by the University, according to Radio One, made a successful application for the relocation of Radio One's transmitter impossible, and the filing by Radio One, of a request to move the transmitter with the FCC, nugatory. Trying to salvage its plan to move its transmitter, Radio One began negotiating with the University to have the University abandon its planned transmitter relocation in favor of a different relocation, into the City of Atlanta, itself. As part of this negotiation, Radio One offered to pay cash and some of the additional costs of this relocation and asked Davis to contribute $250,000 to this effort. Jorgenson declined on behalf of Davis; instead, Davis offered to contribute $100,000, at most, in installments. Ultimately, negotiations with the University failed.

Radio One then entered into negotiations with another license holder, Educational Media Foundation ("EMF") to change its station location, which Radio One believed would allow it to consummate its Agreement with Davis and

to keep its WPZE transmitter in Mableton. This negotiation ultimately failed, as well.

Pursuant to the Agreement, Radio One hired engineering consultants to determine whether, given the circumstances described above, the contemplated move of Radio One's transmitter from Mableton to Dunwoody was permissible under FCC regulations and similarly whether upgrading the transmitting power of WPZE at its current location was permissible. Under Article 15.1 of the Agreement, "if between the dates hereof and the filing of the [request to the FCC] either Davis or the Radio One entities deemed that either of the engineering exhibits is not acceptable in its sole discretion, then it may terminate this Agreement upon written notice to the other." Deciding that the engineering exhibits demonstrated that the purpose of the Agreement could not be effectuated, Radio One deemed the exhibits "not acceptable" and, on April 13, 2012, provided written notice to Davis that the Agreement was terminated.

On July 30, 2012, Davis sent a letter to Radio One, claiming that Radio One had failed to use commercially reasonable efforts to consummate the Agreement, as required. Davis demanded that Plaintiffs retain the properties at issue and threatened to seek specific performance of the Agreement. In response, Radio One brought this action seeking a declaration that "pursuant to Article 15 of the Agreement, Plaintiffs properly terminated the Agreement on April 13, 2012 and

that all of their obligations under the Agreement are extinguished," together with a declaration that Radio One's efforts to effectuate the Agreement had been "commercially reasonable."[8]

This request for declaratory judgment was the only relief sought in the initial Complaint. Davis moved to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction. Radio One then amended its Complaint, adding counts seeking injunctive relief. In the new counts of the Amended Complaint, Radio One seeks to enjoin Davis from interfering with any potential sale of its radio stations by attempting to enforce the Agreement (Count III) and to enjoin Davis from filing an action relating to the Agreement in another jurisdiction (Count IV). Davis renewed its Motion to Dismiss; this is my decision on that Motion.

II. LEGAL STANDARD

This Court is a court of limited jurisdiction. Except where jurisdiction is provided by statute—as is manifestly not the case here—this Court has jurisdiction to hear cases only if Plaintiff seeks to vindicate an equitable right or where the Plaintiff seeks an equitable remedy where no adequate remedy exists at law.[9] As then-Vice Chancellor Chandler famously noted, artful pleading will not convert a legal matter into an equitable one:

---

[8] Compl. ¶¶ 66, 69.

[9] *E.g.*, *Duff v. Innovative Discovery LLC*, 2012 WL 6096586, at *4 (Del. Ch., Dec. 7, 2012) (citing *Israel Disc. Bank of N.Y. v. First State Depository Co.*, 2012 WL 4459802, at *4 (Del. Ch. Sept. 27, 2012)).

> It has been frequently said that this Court, in determining jurisdiction, will go behind the 'façade of prayers' to determine the 'true reason' for which the Plaintiff has brought suit. By this it is meant that a judge in equity will take a practical view of the complaint, and will not permit a suit to be brought in Chancery where a complete legal remedy otherwise exists but where the Plaintiff has prayed for some type of traditional equitable relief as a kind of formulaic 'open sesame' to the Court of Chancery.[10]

Furthermore, when subject matter jurisdiction is at issue, the plaintiff bears the burden of establishing such jurisdiction.[11] "[T]he court must review the allegations of the complaint as a whole to determine the true nature of the claim."[12]

III. ANALYSIS

A. Counts I and II: Declaratory Judgment

In bringing this action, Radio One intended to forestall Davis (the natural Plaintiff here) from pursuing contractual relief: Radio One seeks to obtain a declaratory judgment that Radio One properly terminated the Agreement and complied with its contractual obligation to use commercially reasonable efforts to close. Declaratory judgment, of course, is a statutory action which may be brought at law.[13] The relief sought in Counts I and II, therefore, is available in the Superior Court, and this Court has no jurisdiction to hear Counts I and II, unless as part of

---

[10] *Int'l Bus. Machines Corp. v. Comdisco, Inc.*, 602 A.2d 74, 78 (Del. Ch. 1991) (internal citations omitted).
[11] *Christiana Town Ctr., LLC v. New Castle Ctr.*, 2003 WL 21314499, at *3 (Del. Ch. June 6, 2003) *aff'd sub nom, Christiana Town Ctr., LLC v. New Castle Cnty.*, 841 A.2d 307 (Del. 2004).
[12] *Id.*
[13] 10 *Del. C.* § 6501 *et seq.*

our ancillary jurisdiction, which I have the discretion to exercise if the additional Counts pled in the Amended Complaint confer equitable jurisdiction.[14]

Radio's One's arguments to the contrary can be quickly dealt with. The Plaintiff makes the facile, but ultimately unfruitful, argument that the relief it seeks in the first two counts involves equity, in that Davis's threat to seek to enforce its contractual rights under the Agreement has resulted in a *de facto* "cloud" on its title over its property: specifically, over the radio stations at issue in the Agreement. Removing clouds on title, Radio One points out, is a traditional matter for equity.

This argument is a facially clever but unavailing. Davis has threatened to assert its contractual—that is its *legal*—rights under the Agreement. Such an assertion does not create a title defect or otherwise affect legal title to the stations in question. To the extent it can be considered a "cloud" on title, that cloud will dissipate—or become concrete—upon the adjudication of the purely legal issues presented by the Plaintiff in Counts I and II. In other words, complete relief is available at law: if Radio One establishes at law that it has no contractual obligations to Davis under the Agreement, no cloud on Radio One's ability to transfer its property will exist.

---

[14] *See W. Air Lines, Inc. v. Allegheny Airlines, Inc.*, 313 A.2d 145, 149 (Del. Ch. 1973) ("Unless the record indicates some special, traditional basis for equity jurisdiction, this Court does not have jurisdiction in a declaratory judgment action.").

B. Counts III and IV: Injunctive Relief

I now turn to the requests for injunctive relief in Counts III and IV. In Count III, Radio One seeks to enjoin Davis from interfering with "Plaintiffs' operation and disposition" of radio stations WPZS and WQNC. Injunctive relief is a traditional equitable remedy, available under the jurisdiction of the Court of Chancery. However, the injunction sought here is simply to prevent "interference" in Radio One's business by Davis, via *Davis' assertion of its rights under the contract.* That is, if the legal parts of this action involving the declaratory judgment of the parties' rights under the contract turn out successfully for Radio One, Davis will have no rights under the contract and the injunctive relief request will be moot. If Davis prevails, Radio One will be unable to show that it is entitled to relief, and no injunction will be available. In other words, the request for injunctive relief in Count III is just a formulaic restatement of the contract claims in Counts I and II. It cannot provide a basis for subject matter jurisdiction.

Count IV is a similar make-weight request for injunctive relief designed solely, I fear, to provide a basis for equitable jurisdiction. Radio One seeks to enjoin Davis from filing an action based on the Agreement in another jurisdiction. This is not a serious request for injunctive relief. If Radio One receives the declaratory judgment it seeks in Count I and II, that decision will be *res judicata* with respect to a contract action brought in another jurisdiction. Davis has

represented that it has no plans to bring such an action;[15] if it did so, based on that representation, and based on the first-filed nature of this action, principles of comity would likely influence that second court to stay or dismiss the action in favor of the first-filed Delaware action. In any event, I do not consider a threat of duplicative litigation, to the extent it exists, sufficient to invoke the equitable protections of this Court in a manner which would convert a contract action into an action for equitable relief.

Radio One points out that the Complaint alleges that Radio One is under contract to sell a radio station implicated in the deal with Davis to a third party, that Davis has asserted that Davis will enforce its contract rights by seeking specific performance, that this threat makes the potential sale of Radio One's radio station to the third party problematic, and that our Supreme Court's holding in *Diebold Computer Leasing, Inc. v. Communal Credit Corp.*, therefore supports Radio One's claims for injunctive relief.[16] The Supreme Court held in *Diebold*:

> [I]t is agreed that the breach against which preventive relief is sought in equity need not have been actually committed at the time of the application for relief; it being a sufficient ground of judicial interference that the defendant, as of that time, claims and insists upon his right to do the act complained of. And equity will take jurisdiction if the defendant has manifested an intent to act, even though it is not

---

[15] Oral Argument Tr. 7:17-22 (Jan. 3, 2013)("We have no plans to sue in another state. I have not had that discussion with my clients. I'm loathe to promise forever that they never would because we haven't had that discussion, but we have not had any discussion about suing in another state.").

[16] 267 A.2d 586 (Del. 1970).

> clear at the outset whether the action which the defendant is about to take is in violation of the contract.[17]

Diebold involved a defendant that had threatened to declare a default on a line of credit, agreed to under a contract, and to take other actions inimical to the plaintiff, if the plaintiff pursued certain rights.[18] Under the circumstances of that case, damages would be unable to make the plaintiff whole if this alleged breach took place, and our Supreme Court determined that the plaintiff's request to enjoin the breach stated a sufficient claim in equity—to require the defendant to comply with its contractual obligations and thus preserve the status quo ante.[19] Therefore, jurisdiction was conferred upon this Court. In other words, *Diebold* was a straightforward case seeking to enjoin a threatened breach of contract which portended irreparable harm: a cause in equity.

Diebold is distinguishable on at least two grounds. First, nothing in the Complaint, if true, demonstrates, and nothing in logic compels me to find, that the "harm" alleged here—the potential loss of the sale of a discrete asset—is irremediable by money damages. Radio One's citation to loss-of-merger-opportunity cases finding potential irreparable harm is inapt.[20] More fundamentally, in contrast to *Diebold*, here the Agreement has *already* been

---

[17] *Id.* at 590.
[18] *Id.* at 589.
[19] *Id.* at 590-91.
[20] Pl.'s Ans. Br. 16-17 (citing *Revlon, Inc. v. MacAndrews & Forbes Hldgs., Inc.*, 506 A.2d 173, 184 (Del. 1986), *Ace Ltd. v. Capital Re Corp.*, 747 A.2d 95, 110 (Del. Ch. 1999), and *True North Commc'ns, Inc. v. Publicis, S.A.*, 711 A.2d 34, 44-45 (Del. Ch. 1997)).

terminated. Davis threatened to bring legal action to enforce its rights arising from what it sees as Radio One's breach of the Agreement, not (as in *Diebold*) to unilaterally change the status quo pending a determination of its contractual rights. Radio One, in response, brought this declaratory judgment action. Here, it is the *Plaintiff* who seeks to change the status quo, by selling the stations that, according to the Defendant, it is contractually bound to sell to Davis.[21] Although Radio One has not moved for expedited relief, if it were to seek a preliminary injunction here its request would stand *Diebold* on its head: to enjoin the Defendant from actions seeking to *preserve* the status quo pending resolution of the contract rights of the parties. The Plaintiff would not be entitled to such relief. Upon judicial determination of the contractual—that is, the legal—rights at issue, on the other hand, the Defendant's litigation threat would be vindicated or mooted, and no injunctive relief would be necessary or appropriate. In either case, the benefits Radio One may obtain by pursuing final equitable relief constitute a null set. Radio One's claim for equitable relief, therefore, is nothing more than a restatement of its contract claim, which explains why it was pled only in response to the first motion to dismiss.[22]

---

[21] Davis, itself, has not sought injunctive relief.

[22] If Radio One were concerned that a cloud caused by this litigation prevents sale of its assets, its remedy is to seek expedition, not interim injunctive relief. A request for expedition is available in Superior Court. *See Dunkin Donuts, Inc. v. O'Connor*, 1994 WL 178142, at *3 (Del. Ch. Apr. 28, 1994)("The Superior Court affords an 'expedited track' for specified kinds of matters, but there is no evidence that the Superior Court has been asked to expedite the action

Radio One's oral argument suggested another ground for assertion of equitable jurisdiction; that if I remand the case to the Superior Court, Davis may make good on its threat to seek specific performance, rendering that court without jurisdiction and bringing the case back to this Court, in a costly and nonsensical loop. If this appeared to me to be a realistic possibility, I would have to consider whether, absent a waiver of equitable relief by the Defendant, principles of equity and economy strengthened Radio One's case for jurisdiction in this Court. Based upon the allegations of the Complaint, I find the chance of a successful suit for specific performance to be vanishingly small here, however.

> Specific performance is an extraordinary remedy, appropriate where assessing money damages would be impracticable or would fail to do complete justice. . . . A party is never absolutely entitled to specific performance; the remedy is a matter of grace and not of right, and its appropriateness rests in the sound discretion of the court. In general, equity will not grant specific performance of a contract if it cannot "effectively supervise and carry out the enforcement of the order." Moreover, the balance of the equities must favor granting specific performance.[23]

---

pending before it. Nor has the plaintiff shown that it would suffer irreparable harm if the matter were allowed to proceed in the Superior Court on an expedited schedule. I therefore must conclude that no urgent need has been shown for this Court to exercise jurisdiction over a dispute that, insofar as the present record discloses, could be finally determined as fully and expeditiously by the Superior Court as by this Court.").

[23] *W. Willow-Bay Court, LLC v. Robino-Bay Court Plaza, LLC*, 2007 WL 3317551, at *12-13 (Del. Ch. Nov. 2, 2007) *aff'd sub nom*, *Robino-Bay Court Plaza, LLC v. W. Willow-Bay Court LLC*, 985 A.2d 391 (Del. 2009).

Specific performance is an extraordinary remedy that is only available where the parties are *capable of performing under the agreement.*[24] As I have explained above, the Agreement here was contingent on the parties' obtaining multiple regulatory approvals from the FCC. Since those approvals have not been obtained, the parties are not capable of performing under the Agreement.[25] The only mention of specific performance in the Agreement is on Schedule 1, titled "Procedure *Upon FCC Final Order Dismissing or Denying the RONC* Assignment Application."[26] Schedule 1 provides, in relevant part:

> In the event of failure or threatened failure by either Party to comply with the terms of this Agreement, the other Party shall be entitled to an injunction restraining such failure or threatened failure and, subject to obtaining any necessary FCC consent, to enforcement of this Agreement by a decree of specific performance requiring compliance with this Agreement.[27]

This right to specific performance is "subject to obtaining any necessary FCC consent," and because of the intervening application of Clark Atlanta University, those FCC consents appear to be unobtainable. Therefore, in my opinion, it is unlikely that the Defendant could successfully maintain a suit for specific

---

[24] *See Osborn ex rel. Osborn v. Kemp*, 991 A.2d 1153, 1161 (Del. 2010) ("We will order specific performance only if a party is ready, willing, and able to perform under the terms of the agreement.").

[25] It does not necessarily follow that the Plaintiffs were justified in terminating the contract—the Plaintiffs were required to use commercially reasonable efforts to obtain FCC approval—but, if the Plaintiffs did *not* use commercially reasonable efforts to obtain the approvals, then the Defendants have a claim for damages. The Defendants would not, however, have a colorable claim for specific performance.

[26] Ag. Schedule 1 (emphasis added).

[27] Ag. Schedule 1, ¶ 8.

performance for a contract (1) conditioned on a parties' "commercially reasonable efforts;" and (2) subject to and conditioned upon future regulatory approvals by a non-party regulatory agency. Therefore, even if the Defendant may prevail in a counterclaim for damages, its threat to seek specific performance of the Agreement is hollow.

The "true" nature of this action is contractual: complete relief is available at law. If the Plaintiffs' request for equitable relief in this contract action—to enjoin the Defendant from pursuing rights ostensibly under the Agreement which, in fact, it does not have, and preventing the Defendant from the theoretical pursuit of contractual claims in other courts—were sufficient to convert a purely contractual matter from law to equity, the exception would eat the rule, and this Court would no longer remain a court of limited jurisdiction. That would be a meal this Court could not digest consistent with its constitutional role as a court of limited jurisdiction.

IV. CONCLUSION

I find that the true nature of this action involves a request for contractual relief under the Declaratory Judgment Act. A full and adequate remedy is available at law. Therefore, the Court of Chancery is without jurisdiction and the Amended Complaint must be dismissed unless the Plaintiffs timely seek a transfer

to the Superior Court. An appropriate form of order accompanies this Memorandum Opinion.